

Pamela Creighton
Lansing, Michigan 48910

August 28, 2012

Corbin Davis
Supreme Court Clerk
Michigan Supreme Court
PO Box 30052
Lansing, MI 48909

RE: ADM File No. 2012-03

Dear Corbin,

By way of this communication, I am providing a response to the Court's request for comments on proposed MCR 1.111. I sincerely appreciate the opportunity to provide my thoughts and suggestions. If there is a public hearing on the rules, I would be glad to provide further input or answer any questions if appropriate.

Prior to preparing my comments I re-read some of the most important documents and laws our nation and state have enacted for the good of the people. In specific I consulted the following:

FEDERAL

- U.S. CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, **and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.**

AMENDMENT XIV, SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. **No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

- U.S Civil Rights Act of 1964, Title VI, which prohibits discrimination on the basis of several factors including national origin
- Executive Order 13166 of 2000

STATE

- Michigan Constitution, Article I, Sec.1 which states that all political power is inherent in the people. Government is instituted for their equal benefit, security, and protection.
- Article I, Sec. 2, which addresses equal protection and discrimination and states that “no person shall be denied the equal protection of the law...nor discriminated against based on... national origin.”
- Article I, Sec. 17, which addresses due process of law states that “No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.”
- Article I, Sec. 20, which addresses the rights of the accused in a criminal proceeding states that “in every criminal prosecution the accused shall have the rights to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.”
- Article XI, Sec. 1, which is the oath of office all public officials take before assuming office/public service states that all officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall

take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state.

- Michigan Elliott-Larsen Civil Rights Act, P.A. 453 of 1976, which prohibits discriminatory practices and policies based on several factors including national origin
- M.C.L.A. 775.19a, which states, “If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language, the inability to adequately communicate by reason of being mute, or because the person suffers from a speech defect or other physical defect which impairs the person in maintaining his or her rights in the case, the judge shall appoint a qualified person to act as an interpreter.”
- MCR 2.507 (D) Interpreters. The court may appoint an interpreter of its own selection and may set reasonable compensation for the interpreter.

Michigan Code of Judicial Conduct: Canon 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. **A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary.** The provisions of this code should be construed and applied to further those objectives.

Canon 3 (10)

Without regard to a person’s race, gender, **or other protected personal characteristic**, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge’s direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court.

I consulted all of the documents and laws cited above in my attempt to ensure that the comments and suggestions I identify in this communication have a significant basis in law and practice rather than just my personal concerns and viewpoints.

For many decades, Michigan has attempted to establish the highest standards and expectations for those working in the courts. For example, Michigan long ago discontinued a practice known as “reading law”, and replaced it with a requirement that all judges and attorneys seeking to practice law in our state must successfully graduate from law school, and pass the state bar exam. It should be noted that some states such as California, Vermont, Virginia, Maine, Washington, and Wyoming still allow a person interested in practicing law to work under the guidance and direction of an attorney to “learn” the law. In these states, such persons are not required to attend law school, they need only to take and pass the relevant state bar exam.

In addition, MCR 8.108 (G) states that “only certified reporters and recorders may record or prepare transcripts of proceedings held in Michigan courts.” Further, in 1977, the Michigan Supreme Court established the Michigan Judicial Institute in an effort to improve the professionalism and education of judges and court personnel. The focus of the Court has consistently been to establish certain basic academic and minimum competency standards for those who work in and for our trial and appellate courts. For more than 30 years, our courts have increased the educational requirements of those who work in our judicial system such as case workers, law clerks, magistrates, FOC’s, court administrators, and other court employees. The focus on education, excellence, and professionalism has reinforced the public’s trust and confidence in our courts, and lead to more uniform treatment and practices. It has also helped to allow for effective case flow management, and served as a model for many other states over the years. In addition, those who practice law in our courts have come to rely upon the knowledge, training, and abilities of those they work with in the courts on a daily basis.

Recognizing the commitment and priority shown by the Michigan Supreme Court to date on establishing professional standards for those who work for our courts, I am dismayed and confused by what the Court is considering to do regarding the way interpreter issues are addressed. The federal courts have long recognized the need for, and effectiveness of, using professional court interpreters for cases under their jurisdiction. In addition, many other states (such as California, Oregon, and New Jersey etc.) have as well, and only allow the use of certified court interpreters for cases where due process rights or requirements may be involved, or there is a potential for violations of basic rights and laws. In recent years, both state supreme courts and federal courts have issued numerous opinions which have documented the violation of due process rights where an incompetent interpreter was used. Legal Associations such as the ABA and others as recently as February, 2012 have urged courts to require professionalism/credentials in court interpreting.

Given the financial constraints most state and local governments are experiencing, it is in the state’s best interest to use the most qualified interpreters possible to ensure that the cases do not have to be retried or reversed which costs the taxpayers more money in unnecessary protracted litigation. If a court has a number of LEP cases in the same target language, they could create a special docket or day to bring in a certified interpreter. Federal courts manage their LEP dockets quite well using this approach.

With regards to the 3 options/alternatives circulated for consideration and comment, I would say that **Alternative A** may be the least harmful over all. But I do not believe it is sufficient. Limited English Speaking people (LEP'S) are a growing segment of our society. They also present some unique challenges and opportunities for the local trial courts. In a survey of judicial officers and court administrators that was conducted by the Chief Justice's office in 2010, the hundreds of responses that were received to the interpreter survey indicated that courts are increasingly providing services to LEP's. Further, the responses indicated that they are struggling with ways to provide for standard practice, policies, and fairness in cases involving LEP litigants or witnesses. In an effort to assist the courts, the OCJ issued a Judicial Guide for Michigan Courts Addressing Language Barriers and the Use of Interpreters.

Michigan has been a member of the NCSC Consortium for Language Access in the Courts since 1999. The Consortium has developed 20 tests that are available for states to use to establish competency, fluency, and ability of an interpreter. Also other states such as California and New Jersey have tests that they share for use by the Consortium. In addition, the federal courts have developed certification tests as well.

In critical matters such as criminal cases; domestic cases where a parent may lose custody or access to a child; mental health cases, domestic violence, and others it is prudent and advisable to **use only certified** court interpreters. It is important to recognize that state certification indicates that the interpreter has an accuracy rate of at least 70% in the target language. Interpreters who have passed a federal test have a higher accuracy/ability rate.

According to the SCAO website, Michigan has 42 certified Spanish interpreters; 9 certified Arabic; 4 certified Russian; 2 certified Mandarin; 1 certified Japanese, and 1 certified Polish interpreter. Michigan needs more certified interpreters.

In cases where the courts are using non-certified interpreters, many use "interpreting agencies" or some other local service. Unless an interpreter has been tested and certified how is the court to be certain of the abilities and accuracy of the interpreter? As with other court professionals, if an attorney, judge, court administrator etc. did not have to meet minimum competency/educational requirements to practice in the courts most would probably choose not to make the investment of time, money, and effort to get the advanced degrees, go to law school etc. Interpreters are no different. I can think of no other professionals working in the court where just answering a brief set of questions (Voir Dire) allows them to practice before (or in the case of court recorders/reporters at) the bench.

In so many cases local courts are trying to do their best to serve the LEP populations. They use court/public funds to pay the interpreters. Both the court and the LEP rely upon the accuracy and professionalism of the interpreters. Is the court truly getting what it is paying for? Is the litigant or witness receiving justice and due process? There is a section in proposed MCR 1.111 that indicates that the court can hire an interpreter to help the judge "establish the need for an interpreter." If the LEP and the judge cannot understand each other before the proceeding starts, then I think the court should always err on the side of inclusion.

Proposed MCR 1.111 creates a “qualified foreign language interpreter” category. The only requirement for this category is that the “interpreter” is registered with SCAO, and provides responses to the Voir Dire questions.

For minor matters many courts use “Language Line” interpreters. (Interpreters who provide the service from a distance). This may be fine for taking a plea or a limited duration court proceeding. But this is not financially or functionally an option for trials, long hearings, etc. Federally certified interpreters are paid \$380 per day. State certified interpreters in California make \$282 per day/\$156 per half day.

I know the courts frequently use Voir Dire to “swear in” subject matter experts and others who testify in court etc. But a highly competent foreign language interpreter is hired by the court to be a critical communications, cultural, and language connection. The skill and experience they provide is crucial to the accuracy and validity of the court proceeding; invaluable beyond measure to the LEP; and absolutely necessary if courts are to provide the basic legal principles so perfectly and appropriately etched into the walls of the Michigan Hall of Justice. Freedom. Truth. Equality. Justice.

Sincerely,

Pamela J. Creighton